

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

LINDA M. GROSS)	
Claimant)	
VS.)	Docket No. 1,062,896
)	
USD 259)	
Self-Insured Respondent)	

ORDER

Respondent requests review of Administrative Law Judge Thomas Klein's February 14, 2013 preliminary hearing Order. James B. Zongker of Wichita, Kansas, appeared for claimant. Vincent A. Burnett of Wichita, Kansas, appeared for respondent.

Judge Klein found claimant's injury arose out of and in the course of her employment and awarded temporary total disability (TTD) benefits from August 28, 2012 through September 14, 2012. Judge Klein also ordered that the medical bills arising from this injury be paid as authorized.

The record on appeal is the same as that considered by the administrative law judge and consists of the transcript of the February 14, 2013 preliminary hearing and exhibits thereto, in addition to all pleadings contained in the administrative file.

ISSUE

Respondent argues claimant's injury was the result of a neutral risk and requests the Board reverse Judge Klein's Order and find claimant's injury did not arise out of and in the course of her employment. Claimant argues Judge Clark's Order should be affirmed. The issue raised on review is: Did claimant meet with personal injury by accident arising out of and in the course of her employment with respondent?

FINDINGS OF FACT

Claimant has worked for respondent for 13 years as a teacher. As part of her job duties, claimant was required to attend a daily meeting called "Team & Plan." On August 27, 2012, claimant was ascending concrete steps on her way to the meeting when the toe of her shoe caught the lip of a step, causing her to trip forward and land on her left knee. While claimant agrees there was nothing unusual about these steps and admits to having used them a couple of times every week prior to the accident, she does not consider them normal steps. Claimant testified "each one of them has a lip on it that extends from the base of the step outward probably maybe a half inch."

Claimant's hands were full when she fell; she was carrying a salad in one hand and paperwork for the meeting in the other hand. Claimant noted it was normal and customary to bring lunch to the meeting. While claimant testified the meeting was not during her normal lunch hour; she categorized it as a working lunch that she was required to attend. She was paid to attend such meeting. Eating lunch while there saved time and allowed her to use her normal lunch hour to grade papers and perform other activities.

Claimant initially thought she was fine, but discovered when the meeting ended that she was unable to get up from a sitting position. Claimant reported the accident and left work. As no medical treatment was offered, claimant sought treatment that same day through her primary care physician, Terry D. Klein, M.D. An x-ray showed a slightly displaced fracture of the left patella. Dr. Klein provided claimant with a knee immobilizer and referred her to Anthony G. Pollock, M.D.

Claimant saw Dr. Pollock on August 28, 2012. Dr. Pollock noted a definite gap on the anterior aspect of the patella and a swollen knee. Dr. Pollock provided options of nonoperative or operative treatment. Claimant elected to proceed with surgery.

On August 31, 2012, claimant underwent an open reduction and internal fixation of the left patella by Dr. Pollock. Claimant had a post-op visit on September 11, 2012. Dr. Pollock recommended claimant increase the flexion to 30 degrees in the brace when sitting and walk with it in full extension. Dr. Pollock released claimant to regular duties on September 13, 2012.¹

Claimant returned to Dr. Pollock on October 9, 2012. X-rays taken showed excellent position of claimant's patella. Dr. Pollock recommended claimant increase her flexion to 90 degrees and unlock the brace as needed. Dr. Pollock instructed claimant in straight leg raising, weights and abduction exercises to strengthen her leg. Claimant was advised to keep the brace on in various forms for the next month. Dr. Pollock opined claimant had reached maximum medical improvement.

PRINCIPLES OF LAW

K.S.A. 2012 Supp. 44-501b provides, in part:

(c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which claimant's right depends. In determining whether claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

¹ Claimant testified she did not return to work until September 14, 2012. (P.H. Trans. at 5; see also p. 27)

K.S.A. 2012 Supp. 44-508 provides, in part:

(f)(2)(B) An injury by accident shall be deemed to arise out of employment only if:

(i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and

. . .

(3) (A) The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include:

(i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;

(ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;

(iii) accident or injury which arose out of a risk personal to the worker; or

(iv) accident or injury which arose either directly or indirectly from idiopathic causes.

. . .

(h) "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

"Arising out of" and "in the course of" have different meanings:

The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment.²

Workers compensation characterizes risks in three categories: (1) risks particular to the job; (2) those personally associated with the worker; and (3) neutral risks, not associated with either employer or employee.³

² *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984).

³ *McCready v. Payless Shoesource*, 41 Kan. App. 2d 79, 81, 200 P.3d 479 (2009).

ANALYSIS

Claimant's injury was not due to a neutral risk or unexplained reasons. Her accidental injury occurred when walking up stairs, while carrying materials incidental to a mandatory meeting and her salad, which she was allowed to eat during such meeting. There was a causal connection between the work conditions and the resulting accident. Claimant's accidental injury arose out of and in the course of her employment.

CONCLUSIONS

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member concludes claimant's accidental injury arose out of and in the course of her employment.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁴ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2012 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

DECISION

WHEREFORE, the undersigned Board Member affirms Administrative Law Judge Thomas Klein's February 14, 2013 Order.

IT IS SO ORDERED.

Dated this _____ day of April, 2013.

HONORABLE JOHN F. CARPINELLI
BOARD MEMBER

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Honorable Thomas Klein

⁴ K.S.A. 44-534a.